Before the FEDERAL COMMUNICATIONS COMMISSION Washington DC 20554

In the Matter of)	
)	
Petition for Rulemaking to Eliminate the)	MB Docket No. 12-3
Sports Blackout Rule)	

REPLY COMMENTS OF NATIONAL FOOTBALL LEAGUE

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Summary and Introduction

The comments of the proponents of repealing the sports blackout rule are most notable for what they do *not* contain. They fail to provide a scintilla of evidence that the rule causes any harm to even a single sports fan. The commenters overlook the many benefits of packed sports stadiums. They similarly ignore the abundant economic evidence that the sports blackout rule is necessary for professional sports to continue to be available on free, over-the-air broadcast television. And the proponents fail to cite a single statute or legal precedent that would allow the Commission to repeal the blackout rule for satellite ("DBS") and open video system ("OVS") providers.

The Commission's sports blackout rule continues to serve the public interest by ensuring the wide, long-term availability of live sports, including National Football League ("NFL") games, on broadcast television. The current system works for all interested parties: NFL fans, local businesses, broadcasters, and local clubs all benefit when games are sold out and on television. Local blackouts of NFL games are rare—last year, more than 99% of games were unaffected by local blackouts—and the NFL works extremely hard to avoid them. Proponents of

repeal ignore the continued necessity of the Commission's blackout rule, as well as the many public interest benefits of free, over-the-air broadcast television.

The comments filed in this proceeding clearly demonstrate that the Commission plainly lacks authority to repeal the blackout rule with respect to DBS and OVS providers. Even if the Commission had such authority, however, a decision to repeal the blackout rule in the absence of evidence that the rule no longer serves the public interest would be an arbitrary and capricious exercise of the Commission's rulemaking power.

I. The Sports Blackout Rule Continues to Serve the Public Interest by Promoting Live Sports on Broadcast Television.

When the Commission adopted the sports blackout rule, it concluded that the policy "helps to assure the continued availability of sports telecasts to the public." The comments of the National Association of Broadcasters ("NAB"), the Office of the Commissioner of Baseball ("MLB"), and NFL—along with the economic analysis submitted by Dr. Hal Singer—demonstrate that the sports blackout rule continues to serve this important purpose and is beneficial to broadcast television viewers, NFL fans, and the general public.

A. The Continued Availability of Broadcast Television Is in the Public Interest

The Mercatus Center at George Mason University ("Mercatus Center") argues that the availability of free, over-the-air broadcast television is not in the public interest because "few Americans now rely solely on broadcast television for their entertainment." That statement is in error and contrary to evidence in the record. According to a recent study, upwards of 20% of

¹ Amendment of Part 76 of the Commission's Rules and Regulations Relative to Cable Television Systems and the Carriage of Sports Programs on Cable Television Systems, Report and Order, 54 FCC 2d 265, ¶ 54 (1975).

² Comments of Mercatus Center at George Mason University, MB Docket No. 12-3, at 2 (filed Feb. 24, 2014) (hereinafter, "Mercatus Center Comments").

American households with a television relied exclusively on over-the-air broadcasting in 2013, which represents an increase over 2012 data.³ As Dr. Singer's analysis notes, minority groups and lower-income households "make up a substantial share" of viewers solely reliant on broadcast television.⁴ Mercatus Center's suggestion that Netflix (or other pay-TV services) will replace broadcast television⁵ ignores the current demographic reality. Recognizing the rising costs of pay-TV services for many low and moderate-income consumers, Dr. Singer concludes that "eliminating the [sports blackout rule] would threaten [broadcast]-reliant viewers' ability to watch games for free in their own homes, without generating any tangible offsetting benefits." on the product of the produc

B. The Sports Blackout Rule Is Rarely Invoked, But Remains an Important Part of the NFL's Media Strategy

As commenters on both sides have recognized, local blackouts of NFL games have become increasingly rare over the decades that the rule has been in place and in the past decade the rate has dropped substantially.⁷ This trend is partially due to a number of changes to the NFL's policies: teams now have the ability to reduce the threshold that determines a sellout, and the NFL now can extend the deadline to give a team additional time to sell out a game. The League takes these steps because it wants to avoid all blackouts. Nevertheless, the sports

³ See Comments of National Football League, Declaration of Hal J. Singer, MB Docket No. 12-3, at 9 (filed Feb. 24, 2014) (hereinafter, "Singer Declaration") (citing research conducted by survey firm GfK Media and Entertainment).

⁴ *Id.* at 9–10.

⁵ See Mercatus Center Comments at 4 (arguing that "[m]aintaining sports blackout rules to aid free over-the air television simply hinders these economic and social trends").

⁶ Singer Declaration at 10.

⁷ See Comments of National Football League, MB Docket No. 12-3, at 4–5 (filed Feb. 24, 2014) (hereinafter, "NFL Comments"); Comments of Sports Fans Coalition, Inc. et al., MB Docket No. 12-3, at 20 (filed Feb. 24, 2014) (hereinafter, "SFC Comments") (noting that in 2013 "the number of home game blackouts decreased dramatically").

blackout rule remains a vital part of the NFL's broadcast policy, and the rule should be maintained for the long-term interest of NFL fans and the League's broadcast partners.

The Sports Fans Coalition ("SFC"), which historically has been backed by the pay-TV industry, and other advocates for the multichannel video programming distributors ("MVPDs") that stand to benefit from live sports' migration to pay-TV platforms, are the primary entities that are calling for repeal, and it is easy to understand why: it is in their business interest to undercut local broadcasters and take further advantage of the compulsory copyright license. But the repeal proponents have not provided credible evidence that the sports blackout rule no longer serves the public interest.

SFC, somewhat ironically, takes issue with the fact that local blackouts were nearly nonexistent in the 2013 NFL season, when there were only two blackouts out of a total of 267 NFL games. Given SFC's ostensible goal of "mak[ing] sure that fans have access to games both on television and in the stadium," it is befuddling why SFC finds such dissatisfaction with the reduction in blackouts. If its real agenda were to look out for fans, as opposed to representing the interests of MVPDs, SFC would be cheering the reduction in blackouts.

Instead, it expresses disapproval of clubs' and local businesses' efforts to avoid blackouts by

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⁸ See John Branch, Fan Advocate Seeks Edge in the Washington Game, N.Y. TIMES (Oct. 22, 2010) (reporting that SFC is funded by Verizon and Time Warner Cable), available at http://www.nytimes.com/2010/10/23/sports/23lobby.html?pagewanted=all&_r=1&.

⁹ See, e.g., SFC Comments at 19 ("The NFL, no doubt mindful of this proceeding, nearly eliminated blackouts altogether in the 2013 season.").

¹⁰ Agenda, Sports Fans Coalition, http://sportsfans.org/agenda/ (last visited Mar. 25, 2014).

purchasing blocks of tickets for certain games in the 2013 season, ¹¹ as well as the NFL's ability to adjust the deadline to sell out games. 12 SFC's comments seem to be rooting for more blackouts, an odd position for an organization allegedly dedicated to fans. Equally odd is SFC's suggestion that somehow the League or a member club acted inappropriately in the context of trying to avoid blackouts. 13 Using the Cincinnati Bengals as an example, SFC notes that although the Bengals had several games blacked out during the 2011 season, the Bengals did not have single game blacked out in 2013. SFC argues that this "evidence suggests that the NFL's revised blackout policy was not responsible for the recent dramatic decrease in blackouts."14 While the NFL has made adjustments to its policies in recent years to help ensure that blackouts are rare, the League has never claimed that its policies are solely responsible for increased attendance at home games and fewer local blackouts in recent years. A number of factors are involved in whether a team sells out a particular home game, including stadium capacity, weather, team performance, the availability of entertainment substitutes, and other local factors. (For example, SFC fails to note that the Bengals improved from a 9-7 regular-season record and a third-place finish in the NFL's AFC North Division in 2011 to an 11-5 regular-season record and a division championship in 2013.)

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¹¹ See, e.g., SFC Comments at 22 (citing negatively the fact that "[t]he NFL allows teams to purchase regular season tickets for \$0.34 on the dollar and distribute them to charitable organizations").

¹² See id. at 23 n.68.

¹³ *Id.* at 23.

¹⁴ *Id.* at 22.

Odder still is the suggestion by SFC, based on innuendo, assumption, and conjecture—

but not a single fact—that the League somehow coerced broadcasters to avoid blackouts. The illogic of the claim is apparent on its face: broadcasters and clubs both want to avoid blackouts and both are motivated to avoid blackouts. SFC's deliberately vague and unfounded claim moreover asserts no violation of any Commission rule, since no rule has been violated.

C. The Sports Blackout Rule Promotes the Availability of Sports on Broadcast Television

SFC argues that supporters of the blackout rule must prove "that local blackouts are necessary to maintain financial viability." ¹⁶ The SFC's attempt to create a straw man is unavailing. As NFL and NAB both stated, the blackout rule was not adopted to protect the revenues of sports leagues. ¹⁷ Rather, the rule was adopted to promote the availability of sports programming on free, over-the-air broadcast television; a purpose it continues to serve today. Commenters advocating for repeal of the blackout rule have not provided any credible evidence that the rule causes harm to consumers, and have not shown evidence that repeal would benefit consumers on net, much less that the rule no longer serves its intended purpose of promoting the wide availability of live sports on television. ¹⁸ This is because the rule does, in fact, increase the

¹⁵ *See id.* at 23.

¹⁶ *Id.* at 6.

¹⁷ See NFL Comments at 7; Comments of the National Association of Broadcasters, MB Docket No. 12-3, at 9 (filed Feb. 24, 2014) (hereinafter, "NAB Comments") (observing that the sports blackout rule was "designed to prevent the overall diminishment of sports programming on television and its availability to all Americans").

¹⁸ Although SFC is incorrect that blackout rule supporters must prove that blackouts are necessary to maintain financial viability, the evidence in the record clearly demonstrates that gate receipts account for a substantial portion of league revenues. *See* NFL Comments at 9; Singer Declaration at 14 ("[T]icket sales are estimated to account for approximately one quarter of total team revenues.").

availability of sports on television by encouraging broadcasters and sports leagues to reach deals for exclusive broadcast rights. 19

D. The Sports Fans Coalition's Claim That There Is No Economic Basis for the Sports Blackout Rule Is Refuted by the Record

SFC asserts that "[t]here is no economic basis" for the blackout rule. This assertion is belied by the record. Dr. Singer's economic analysis demonstrates that the blackout rule "benefits consumers by allowing the NFL to engage in efficient contracting with respect to its programming rights," "facilitating the NFL's ability to maintain its 'free-TV' model," and "incentivizing individual NFL teams to temper ticket prices at the margin." Commenters advocating for repeal of the sports blackout rule also entirely ignore the benefits of packed stadiums. As the NFL explained in its initial comments, maximizing live attendance ensures a high-quality experience for television viewers as well as live attendees and increases revenue from gate receipts and in-stadium activities. 23

¹⁹ See Singer Declaration at 8 ("By mandating that MVPDs abide by the blackout clauses in the NFL's private contracts with networks and broadcasters, the [sports blackout rule] obviates the need for the NFL to engage in myriad, time-consuming individual contract negotiations to establish new agreements between (1) itself and television networks, (2) CBS, FOX, NBC and their network affiliates, and (3) network affiliates and MVPDs."). Exclusive broadcast rights for live sports programming are a major part of what attracts advertisers to broadcast television.

²⁰ *Id.* at 3.

²¹ *Id*.

²² *Id.* at 3–4.

²³ See NFL Comments at 8–10, 13.

II. The Record Fails to Support a Conclusion That Repeal of Sports Blackout Rule Would Serve the Public Interest.

A. The Sports Blackout Rule Is Necessary to Ensure the Availability of Live Sports on Broadcast Television Because Contractual Provisions Cannot Replace the Sports Blackout Rule

Contrary to assertions by SFC, the National Cable and Telecommunications Association, and the Independent Telephone and Telecommunications Alliance ("ITTA"), the NFL could not achieve the goals of the sports blackout rule through negotiation of private contracts.

Commenters supporting repeal have provided no evidence to support their assertions. As NAB has observed, there is "absolutely no evidence in the record" to suggest that sports leagues' limited relationships with MVPDs for carriage of the leagues' affiliated networks could be used to ensure that MVPDs would not take advantage of the compulsory copyright license to circumvent local blackouts. ²⁴ In fact, the Declaration of Brian Rolapp demonstrates just the opposite—that contractual provisions cannot replace the blackout rule. ²⁵ Mr. Rolapp explains that the NFL "cannot accomplish [its stadium policy and enforce blackouts by contract] through existing contracts, since no contractual provision exists that the League could invoke to stop, or cause others to stop, importation of a blacked out local game." Furthermore, the NFL's broadcast and MVPD partners have no incentive to renegotiate their contracts with the League to

²⁴ NAB Comments at 8. Additionally, commenters arguing that sports leagues could achieve the goals of the blackout rule through private contracts with MVPDs have not addressed how it would be permissible for sports leagues and MVPDs alone to contract for modification of broadcast stations' signals, the retransmission of which is subject to separate agreements between broadcast stations and MVPDs.

²⁵ *See* Comments of National Football League, Declaration of Brian Rolapp, MB Docket No. 12-3 (filed Feb. 24, 2014).

²⁶ *Id.* at 3.

add provisions that would accomplish the purposes of the blackout rule.²⁷ MLB agrees that elimination of the blackout rule will leave professional sports leagues without a practical means of bargaining for blackout protection.²⁸

B. <u>Existing Statutory Provisions and Other Commission Rules Cannot Replace the</u> Blackout Rule

SFC also attempts to argue that other Commission rules will do the same job as the sports blackout rule and so therefore it should be repealed. Setting aside the inconsistency of this position, the SFC's argument is simply wrong. The network nonduplication and syndicated exclusivity rules would not prevent MVPDs from importing signals of blacked out games into local markets, as SFC asserts. The purpose of these rules is to prevent *duplication* of programming carried by both a local broadcast station and more distant broadcast stations carried into the market by cable and satellite providers. In instances where a game is blacked out locally on broadcast television, the network nonduplication and syndicated exclusivity rules would have *no effect* on an MVPD's ability to import a distant signal of the blacked-out game. Because the local game would not actually be broadcast by the local station (other programming would be substituted), the MVPD's retransmission of the blacked-out game via its carriage of a distant station's signal would not be duplicative of the programming carried by the local station. The

²⁷ See id.

²⁸ See Comments of the Office of the Commissioner of Baseball, MLB Docket No. 12-3, at 10 (filed Feb. 24, 2014).

²⁹ See SFC Comments at 8–10.

³⁰ To illustrate, if a broadcast station in Buffalo does not air a Bills home game during a particular week due to blackout restrictions, the station might receive substitute sports programming, perhaps a Broncos home game. If a Buffalo-area cable provider then chose to import a distant signal of the Bills game, the network nonduplication and syndicated exclusivity (continued...)

rationale behind the network nonduplication and syndicated exclusivity rules therefore would be entirely inapplicable.³¹

In addition, SFC's assertion that the "unserved household" limitation would prevent widespread importation of distant signals of blacked out games into local markets also misses the mark. The unserved household limitation is applicable only to satellite importation of distant signals, and only applies in well-defined circumstances of signal quality and coverage. Thus, the "unserved household" limitation would not be applicable to a blackout context for DBS providers, and literally has nothing to do with cable providers. Citation of unserved households is a non sequitur to a discussion of sports blackouts.

Lastly, SFC is in error in asserting that the current copyright royalty system would discourage all cable systems from transmitting distant signals of blacked out local games. As the NFL has previously explained, the current formula used to determine semi-annual royalties would not require many cable systems to pay additional royalties for transmitting distant signals of some of the most popular NFL games.³³ This is because cable systems do not pay additional

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rules would have no effect on the cable provider's ability to do so, because the distant signal carrying the Bills game would not be duplicating the Buffalo broadcast station's programming.

Moreover, even if the exclusivity rules could be used in order to secure blackouts of non-duplicative programming, the distant stations' programming could be carried in many cases anyway, due to the "significantly viewed" exception to such rules. (Stations whose signals are "significantly viewed" in a particular area are not subject to deletions under the network nonduplication and syndicated exclusivity rules.) *See* 47 C.F.R. § 76.92(f) (network nonduplication) ("A community unit is not required to delete the duplicating network programming of any television broadcast station which is significantly viewed in the cable television community"); id. § 76.106 ("Notwithstanding the [syndicated exclusivity rules], a broadcast signal is not required to be deleted from a cable community unit . . . when the signal is significantly viewed.").

³² See 17 U.S.C. § 119.

³³ Letter of Gerard J. Waldron, Counsel to the National Football League, to Marlene Dortch, Secretary, FCC, MB Docket No. 12-3 (Nov. 20, 2013).

Additionally, the fees for the next few distant signals that a cable system transmits could be *de minimis*, depending on a number of factors specified in the formula.³⁵ In such cases, any additional royalties would be so small that they would not seriously deter cable systems from transmitting highly rated programming such as NFL games.³⁶

Moreover, cable and satellite carriage of stations that are "significantly viewed" in an area is royalty-free.³⁷ Thus, pay-TV operators have no incentive not to retransmit the signals of out-of-market stations that are significantly viewed in an area—and they often do just that.

Because such out-of-market stations would not be subject to locally-imposed sports blackouts, the compulsory copyright system provides no disincentive to circumvention of blackouts by pay-TV operators.³⁸

³⁴ See id.

³⁵ *Id*.

³⁶ *Id*.

³⁷ Cable operators are permitted to retransmit significantly viewed signals into local markets under the Section 111 license on a royalty-free basis. *See* 17 U.S.C. § 111. The Satellite Television Extension and Localism Act of 2010 provided parity for satellite operators by moving the copyright for significantly viewed stations from 17 U.S.C. § 119 to § 122. *See* Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, § 103, 124 Stat. 1218, 1227–28 (2010).

³⁸ For example, assume Station X is significantly viewed in all of the counties in Market Y, which is home to Team Z. Station X's signal is carried by DISH, DirectTV, and Comcast to subscribers in Market Y. These operators pay no copyright fees for carriage of Station X's signal into Market Y. (Station X is also immune from network nonduplication and syndicated exclusivity blackouts in Market Y.) If there is a blackout of a Team Z game, the *only* thing preventing circumvention of the local blackout is the effectiveness of the sports blackout rule.

C. Repealing the Sports Blackout Rule Without Evidence That the Rule No Longer Serves the Public Interest Would Be Arbitrary and Capricious

The Commission adopted its Notice of Proposed Rulemaking ("NPRM") in this proceeding to evaluate "whether the sports blackout rules remain necessary to ensure the overall availability of sports programming to the general public." The comments filed in response to the NPRM provide ample evidence that elimination of the blackout rule would adversely affect sports fans and the general public and would undermine the availability of sports on free, overthe-air broadcast television. In addition to the evidence cited in comments filed by MLB, NAB, and NFL, the economic analysis of Dr. Singer and the sworn declaration of Brian Rolapp demonstrate the continued necessity of the blackout rule. Conversely, the NPRM primarily relies on the Sports Economists' report for its proposed changes; as the NFL demonstrated in its initial comments, the Sports Economists' report has virtually no underlying factual support. Commenters arguing that the blackout rule is no longer necessary similarly rely entirely on unsubstantiated and incorrect assertions that the goals of the blackout rule could be achieved through private contract or by reliance on other legal provisions, or that the blackout rule is somehow harmful to consumers.

Commission action will be held invalid under the Administrative Procedure Act if the Commission has not "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"⁴⁰ The Commission's explanation for its decision "cannot run counter to the evidence," or its decision

³⁹ In the Matter of Sports Blackout Rules, Notice of Proposed Rulemaking, MB Docket No. 12-3, at ¶ 1 (Dec. 18, 2013).

⁴⁰ Kristin Brooks Hope Ctr. v. FCC, 626 F.3d 586, 588 (D.C. Cir. 2010) (alterations in original) (internal quotation marks omitted) (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

will be struck down as arbitrary and capricious.⁴¹ Because of this requirement that Commission action be supported by the evidence, even if the Commission had the authority to repeal the blackout rule (which it does not with respect to DBS and OVS providers), such a decision made in the absence of credible evidence that the blackout rule is no longer necessary would be an arbitrary and capricious exercise of the Commission's rulemaking power and thus invalid.

III. The FCC Lacks Authority to Repeal the Sports Blackout Rule to DBS and OVS Providers.

Commenters advocating for repeal of the blackout rule largely ignore the fact that the Commission does not have the authority to repeal the rule for DBS and OVS providers. SFC does not even address this issue. ITTA acknowledges that Congress "direct[ed] the Commission to extend the sports blackout rules it had adopted to DBS and [OVS] providers," but argues that the Commission should repeal these rules along with the cable blackout rule to "avoid creating undue disparities among [cable operators and other MVPDs]." Regulatory parity may be a legitimate policy objective, but it cannot trump a clear statutory requirement.

Mercatus Center is the only party that substantially addresses this issue, but its argument relies entirely on an inapposite D.C. Circuit case, *Telecommunications Research and Action*Center ("TRAC") v. FCC. 43 In the TRAC case, Congress had passed a statute that excluded certain broadcast news activities from the fairness doctrine. 44 The statute at issue included this provision: "Nothing in the foregoing sentence shall be construed as relieving broadcasters, in

⁴¹ See id. (alteration omitted).

⁴² Comments of the Independent Telephone & Telecommunications Alliance, MB Docket No. 12-3, at 6 (filed Feb. 24, 2014).

⁴³ Telecommc'ns Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986).

⁴⁴ See id. at 517.

connection with the presentation of newscasts, news interviews, news documentaries, and onthe-spot coverage of news events, from the obligation imposed on them under this Act to operate
in the public interest and to afford reasonable opportunity for the presentation of conflicting
views on issues of public importance."⁴⁵ The Telecommunications Research and Action Center
argued that the provision quoted above codified the fairness doctrine and precluded the FCC
from making any changes to the doctrine, an argument that the court rejected. However, the
attenuated statutory argument rejected in the *TRAC* case bears no relation to the plain-language
requirements of the Telecommunications Act of 1996 and the Satellite Home Viewer
Improvement Act of 1999 ("SHVIA") regarding application of the sports blackout rule. Both
statutes state that the FCC "shall" enact the sports blackout rule. ⁴⁷ The FCC is not permitted to
ignore this clear congressional mandate that the Commission enact the sports blackout rule for
DBS and OVS providers.

Conclusion

The sports blackout rule continues to serve the public interest by promoting the widespread, long-term availability of live sports on television, and the record in this proceeding

⁴⁵ *Id.* (quoting 47 U.S.C. § 315(a) (1982)).

⁴⁶ *See id.* at 517–18.

⁴⁷ See Telecommunications Act of 1996, 47 U.S.C. § 573(b)(1)(D) ("[T]he Commission shall complete all actions necessary . . . to prescribe regulations that . . . extend to the distribution of video programming over open video systems the Commission's regulations concerning sports exclusivity." (emphasis added)); Satellite Home Viewer Improvement Act of 1999, 47 U.S.C. § 339(b)(1)–(2) ("[T]he Commission shall commence a single rulemaking proceeding to establish regulations that—apply . . . sports blackout protection . . . to the retransmission of the signals of nationally distributed superstations by satellite carriers to subscribers; and . . . to the retransmission of the signals of network stations by satellite carriers to subscribers. . . . The Commission shall complete all actions necessary to prescribe regulations required by this section so that the regulations shall become effective within 1 year after [the date of the statute's enactment]." (emphasis added)).

provides no basis for repeal. The sports blackout rule prevents circumvention of local blackouts on the rare occasions when they occur. This protection is pro-consumer because it provides an incentive for sports leagues to continue to televise their games on free, over-the-air television. Additionally, the Commission does not have the authority to repeal the sports blackout rule with respect to DBS and OVS providers. The Commission's proposal to repeal the rule therefore must be rejected.

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